(2)

No. 86-597

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNION GAS COMPANY, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ANNE S. ALMY
ARTHUR E. GOWRAN
Attorneys

Department of Justice
Washington, D. C. 20530
(202) 633-2217

11pp

QUESTION PRESENTED

Whether the Eleventh Amendment of the United States Constitution bars a suit against a state pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*

TABLE OF CONTENTS

Page

Interest of the United States 1

Statement 2

Argument 4

Conclusion 6

TABLE OF AUTHORITIES

Constitution and statutes:

U.S. Const. Amend. XI 3

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 1

§ 101(20), 42 U.S.C. 9601(20) .....

§ 101(20)(A), 42 U.S.C. 9601(20)(A) 1

§ 101(20)(D), 42 U.S.C. 9601(20)(D) 4

§ 104, 42 U.S.C. 9604 3

§ 107, 42 U.S.C. 9607 ..... 3, 5

Federal Water Pollution Control Act, 33 U.S.C. 1151 *et seq.* :

33 U.S.C. 1321(b)(3) 1, 3

33 U.S.C. 1321(f)(2) 2, 3

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (Oct. 17, 1986) 4

§ 4 4

Page

Constitution and statutes—Continued:

§ 113 5

§ 113(b) 5

Miscellaneous:

H.R. Rep. 99-962, 99th Cong., 2d Sess. (1986) 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-597

UNION GAS COMPANY, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States commenced this lawsuit in the district court to recover its cleanup costs pursuant to the Comprehensive Environment Response, Compensation, and Liability Act of 1980 (CERCLA) and the Clean Water Act, 33 U.S.C. 1321(b)(3) and (f)(2), naming petitioner Union Gas Company as the sole defendant. Petitioner filed a third-party complaint naming respondent Commonwealth of Pennsylvania and the Borough of Stroudsburg as third-party defendants, alleging that they were owners and operators of a facility at the site within the meaning of CERCLA, 42 U.S.C. 9601(20)(A), and caused or contributed to the release of hazardous substances involved in this case. The litigation between petitioner and the United States was settled in the district court. Petitioner seeks review of the dismissal of its third-party complaint against the state in this Court.

Because Congress enacted CERCLA to secure the expeditious cleanup of the Nation's pollution sites and to secure voluntary compliance with cleanup objectives and, failing that, to authorize the United States Environmental Protection Agency (EPA) to accomplish the cleanup, the interest of the United States in the interpretation of CERCLA and its amendments is both clear and substantial. This case raises an important question regarding the administration of CERCLA—namely, whether a private person who has expended considerable sums to clean up a designated pollution site for which a state is partially responsible may secure contribution from the state under the liability provisions of CERCLA.

STATEMENT

1. Between 1890 and 1948, certain predecessors of petitioner Union Gas Company owned and operated a carburetted water gas plant near Brodhead Creek in Stroudsburg, Pennsylvania, which produced coal gas as well as its by-product, coal tar. Sometime after 1948, the plant was dismantled. The company operating the plant changed ownership several times before being merged into Union Gas Company in 1978. In 1953 and 1970, petitioner's predecessors sold portions of the land near Brodhead Creek to Pennsylvania Power and Light Company, which, in turn, granted easements over the land to the Borough of Stroudsburg. Because of flooding in 1955, the Borough, the State of Pennsylvania, and the Army Corps of Engineers dug levees, constructed dikes, narrowed and deepened the creek, and redirected its flow. In early 1980, the Borough assigned its easements to the State. Pet. App. A3.

On October 7, 1980, the State, while it was excavating at the creek, struck a massive deposit of coal tar, which thereupon seeped into the creek. The EPA was alerted to the seepage; concluding that coal tar is a hazardous substance, the agency ordered that the site be cleaned up. The state and

the federal governments jointly undertook the cleanup: they dredged the back channel of the creek, installed a slurry wall to prevent additional coal tar seepage, and cleaned up the coal tar that had already seeped into the water. After reimbursing the State for all of its costs, the federal government expended approximately $720,000. Pet. App. A3.

2. On May 23, 1983, the United States brought suit in federal district court against petitioner under 42 U.S.C. 9604 and 9607 for recoupment of costs incurred in cleaning up the spill.[1] The United States asserted that the coal tar had been deposited into the ground near the creek by petitioner and its predecessors, as a result of their carburetted water gas processing. Consequently, the United States maintained that petitioner was liable for the cleanup costs. Petitioner answered the complaint, denying all liability, and filed a third-party complaint naming the State and the Borough as third-party defendants. It alleged that the State and Borough were owners and operators of a facility at the site, and that they had negligently caused, or contributed to, the discharge of coal tar into the creek as a result of their recent excavation and construction of dikes and levees. Petitioner alleged, therefore, that the State and the Borough were responsible for paying the cleanup costs. Pet. App. A3-A4.

The State moved to dismiss the third-party complaint, asserting that it was immune from suit under CERCLA by reason of the Eleventh Amendment to the United States Constitution. The district court granted the State's motion (Pet. App. A35). Thereafter, the United States filed an amended complaint, and petitioner filed an amended third-party complaint against the State and Borough, which the

---

[1]The United States also sought recovery of its cleanup costs under the Federal Water Pollution Control Act, 33 U.S.C. 1321(b)(3) and (f)(2). Petitioner did not file a third-party claim with respect to this claim.

State again moved to dismiss. The district court granted the State's motion for the reasons set forth in its earlier opinion. Pet. App. A4-A5.

3. Some months later, a settlement was reached by the United States, petitioner and the Borough under which petitioner agreed to pay a major portion of the cleanup costs. As a result of this settlement, the district court dismissed the lawsuit. Petitioner thereupon appealed the district court's dismissal of the State as a defendant. Pet. App. A5.

On June 11, 1986, a divided court of appeals upheld the district court's dismissal, finding that neither CERCLA itself nor its legislative history demonstrated congressional intent to abrogate the State's immunity under the Eleventh Amendment (Pet. App. A1-A31). This petition was timely filed on October 8, 1986.[2]

4. On October 17, 1986, the President signed the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499.[3]

ARGUMENT

The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (Oct. 17, 1986), amends the CERCLA definitions relating to liability. Paragraph 20 of Section 101 of CERCLA, defining "owner or operator," is amended by the addition of the following new paragraph:

> (D) The Term "owner or operator" does not include a unit of State or local government which acquired

---

[2]On August 27, 1986, Justice Brennan extended the time for filing the petition to and including October 8, 1986 (Pet. App. A47).

[3]The Amendments became effective on the date of enactment. See Pub. L. No. 99-499, § 4.

> ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 [42 U.S.C. 9607].

In the joint explanatory statement of the Committee of Conference, it is noted that the Senate amendment proposes to modify Section 101(20) of CERCLA, the definition of "owner or operator," to exclude a state or local government which acquired title or possession involuntarily and as a result of its function as sovereign. The House amendment contains no such provision. The Conference substitute adopts the Senate provision with a modification providing that if the state or local government caused or contributed to the release or threatened release of a hazardous substance, then the state or local government entity is subject, both procedurally and substantively, to the provisions of CERCLA to the same extent as any nongovernmental entity, including liability under Section 107 and as is made clear in the Committee Report, contribution under Section 113 of the statute. H.R. Rep. 99-962, 99th Cong., 2d Sess. 185-186 (1986). In addition, Section 113 of CERCLA was amended expressly to provide for a federal cause of action for contribution. Section 113(b) of Pub. L. No. 99-499.

This new legislation, therefore, directly addresses the question of state immunity, and authorizes suits against states or local governments for liability or contribution

when such entities caused or contributed to the release or threatened release of a hazardous substance. Accordingly, this Court should vacate the judgment herein and remand this case to the court of appeals for consideration of the effect of the new legislation.

CONCLUSION

The judgment should be vacated and this case remanded for reconsideration.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ANNE S. ALMY
ARTHUR E. GOWRAN
Attorneys

DECEMBER 1986